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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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SEP 17 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

MELVIN L. MATLOCK,

Plaintiff and
Respondent,

-vs-

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Defendant and
Appellant.

Case No. ~~60174~~

14107

REPLY BRIEF

Appeal from the Judgment of the
Second Judicial District Court, Weber County

Honorable John F. Wahlquist, Judge

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FILED

OCT 20 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MELVIN L. MATLOCK,)	
)	Case No. 60174
Plaintiff and)	
Respondent,)	
)	
-vs-)	
)	
GOVERNMENT EMPLOYEES)	
INSURANCE COMPANY,)	
)	
Defendant and)	
Appellant.)	

The respondent in his brief has claimed that he is entitled to reasonable attorney's fees for prosecuting the declaratory action which he brought in this case. The appellant, therefore, files this reply brief with respect to Point V of respondent's brief as follows:

POINT V. RESPONDENT IS NOT ENTITLED TO ATTORNEY'S FEES
FOR PROSECUTING THE DECLARATORY ACTION.

The trial court refused to award Mr. Matlock a judgment for attorney's fees incurred in connection with the filing and hearing of the declaratory action which he filed as plaintiff. Plaintiff's counsel has set forth several cases in his argument pertaining to this point, but acknowledges that they are not necessarily authority for his position.

The rule in Utah is set out in American States Insurance Co., Western Pacific Division, v. Walker, 26 Utah 2d 161, 486 P.2d 1042 (1971). This was an

action by the insurer for declaratory judgment determining its liability to the daughter of a named insured under an automobile policy which was affirmed in favor of the insured. However, with regard to attorney's fees, the court observed:

Before an award of attorney's fees can be made in the declaratory judgment action, it must appear that the insurance company acted in bad faith or fraudulently or was stubbornly litigious. Under our practice, an attorney's fee is not allowed in the ordinary lawsuit unless it is provided by statute or by contract.

The trial court in Walker had awarded attorney's fees, and the Supreme Court declined to scrutinize the basis for that award on review stating:

The trial court without making a specific finding to that effect apparently thought the company was acting in bad faith and was stubbornly litigious, since he made an award of an attorney's fee in the matter. We think he acted within his prerogative in doing so.

It appears that considerable discretion is allowed under this litigious or bad faith standard, and Judge Wahlquist having denied plaintiff attorney's fees in this matter certainly acted within his discretionary authority.

In the case of State Farm Mutual Automobile Insurance Co. v. O'Brien, 535 P.2d 46 (Ariz., 1975) the court had an action before it in which the insured sought a declaratory judgment pertaining to automobile liability coverage for an accident which had occurred. Judgment for the insured was affirmed as to coverage under the policy by the Supreme Court but reversed as to the awarding of attorney's fees for the declaratory action. The Arizona Court held that where the insured brought the action he was not entitled to recover attorney's fees.

It is, therefore, respectfully submitted that the respondent is not entitled to attorney's fees in this case either in the trial of the case or on appeal.

Respectfully submitted,

STRONG & HANNI

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MAILING CERTIFICATE

Mailed two copies of the foregoing to Richard Campbell, Attorney for
Plaintiff and Respondent, 2324 Adams Avenue, Ogden, Utah, this 20 day of
October, 1975.

L. L. Summerhays

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